SUPREME COURT, U. S.
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No. 73-677

In the Supreme Court of the United States

OCTOBER TERM, 1973

BRIGADOON SCOTCH DISTRIBUTORS, LTD., ET AL.,
PETITIONERS

v.

SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 4a) is reported at 480 F. 2d 1047. The opinions of the district court (Pet. App. 22a, 29a) are not officially reported.

JURISDICTION

The judgment of the court of appeals was entered on June 7, 1973. A petition for rehearing was filed on June 21, 1973, and was denied on July 24, 1973. The petition for a writ of certiorari was filed on October 23, 1973. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court properly enforced a Commission investigative subpoena issued to determine whether persons named in a Commission order of investigation had violated the federal securities laws, without a showing of "probable cause" by the Commission.

2. Whether the term "investment contract" in Section 2(1) of the Securities Act of 1933 and Section 3(a)(10) of the Securities Exchange Act of 1934, as defined in *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, is void for vagueness.

STATEMENT

This case involves the propriety of investigative subpoenas issued by the Securities and Exchange Commission during an investigation of possible violations of the federal securities laws.

1. On February 4, 1971, on the basis of a staff report, the Securities and Exchange Commission ordered an investigation to determine whether petitioners, among others, were engaged in the offer and sale to the public of certain securities, namely whisky warehouse receipts or investment interests in whisky,[1] and whether petitioners, in offering and selling these securities were in violation of the securities registration requirements of Section 5 of the Securities Act of 1933, 15 U.S.C. 77e, the broker-dealer registration requirements of Section 15(a) of

[1]The reference in the Commission's order to "whisky warehouse receipts" constituted a short-hand term to describe the panoply of various investment interests in whisky, whereby an investor is offered and sold identifiable casks of whisky aging in bonded warehouses in Scotland coupled with various services, and where the investment serves to finance those in the scotch whisky industry.

the Securities Exchange Act of 1934, 15 U.S.C. 78o(a), and the antifraud provisions of Section 17(a) of the Securities Act, 15 U.S.C. 78q(a), and Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j(b) (Pet. App. 6a-7a). Petitioners had neither filed with the Commission registration statements for securities being offered pursuant to Section 6 of the Securities Act, 15 U.S.C. 77f, nor applications for registration as brokers or dealers in securities pursuant to Section 15(b) of the Securities Exchange Act, 15 U.S.C. 78o(b).

On April 14, 1971, the Commission issued subpoenas *duces tecum* to petitioners seeking various categories of information, including the names and addresses of purchasers of whisky warehouse receipts or whisky, promotional material used in connection with sales of warehouse receipts or whisky and corporate financial information (see Pet. App. 7a-8a). Neither petitioner fully complied with its subpoena, and the Commission sought enforcement from the district court (Pet. App. 9a).

2. In the district court petitioners resisted the subpoenas on the ground that they were not doing business in "whiskey warehouse receipts," or any other "securities" (Pet. App. 25a). The district court enforced the subpoenas insofar as they sought material which the Commission "must consider in assessing the existence or non-existence of a 'security'" (*e.g.*, purchasers and promotional material) (Pet. App. 27a), but denied enforcement as to information relating to possible violations (*viz.*, financial information) (Pet. App. 27a-28a). The district court granted leave to the Commission to renew the application for enforcement as to the financial information, upon a

showing that the items which petitioners were selling "do in fact constitute securities" (Pet. App. 28a).[2]

3. The court of appeals affirmed the district court insofar as it enforced the subpoenas, and reversed the district court insofar as it refused to enforce the subpoenas and insofar as it required (Pet. App. 20a-21a) a cautionary statement on the Commission's use of investigative subpoenas.[3]

ARGUMENT

The decision of the court of appeals was correct and there is no cause for further review.

1. Petitioners contend that in enforcing the subpoenas the court of appeals violated their Fourth Amendment rights because the Commission made "no factual showing of any kind whatsoever by way of 'probable cause'" in the district court (Pet. 10).

Congress, in Section 20(a) of the Securities Act, 15 U.S.C. 77t(a), and Section 21(a) of the Securities Exchange Act, 15 U.S.C. 78u(a), has authorized the

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[2] The district court granted motions for reargument on January 10, 1973, but adhered to its prior decision (Pet. App. 25a-32a).

In its final order, entered on February 14, 1973, the court required the Commission to inform each witness it called that the proceeding was "only an inquiry" and that "[n]o charge of violation of the federal securities laws has been made against [petitioners] * * *." The full language of this statement, which the court of appeals characterized as "cautionary material" that encumbered the Commission's investigation for "no good reason," is reproduced in the opinion below (Pet. App. 19a-21a).

[3] After the mandate of the court of appeals had issued, the district court, on November 2, 1973, ordered enforcement of the subpoenas as directed by the court of appeals.

Commission to make such investigations as it deems necessary to determine whether any person has violated or is about to violate any provision of those Acts or the rules and regulations thereunder. Congress gave the Commission power, among other things, to require the production of any books, papers, correspondence, memoranda or other records which the Commission deems relevant or material to its inquiry.[4]

This Court has consistently held that an agency which has such authority need not show probable cause, or that the activity investigated is within the coverage of its governing statutes, in order to obtain judicial enforcement of its subpoenas. *United States* v. *Powell,* 379 U.S. 48; *Federal Trade Commission* v. *Crafts,* 355 U.S. 9, reversing *per curiam* 244 F. 2d 882 (C.A. 9); *Oklahoma Press Publ. Co.* v. *Walling,* 327 U.S. 186; *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501. The Fourth Amendment requires only that the disclosure sought shall not be unreasonable.[5] *United States* v. *Morton Salt Co.,* 338 U.S. 632, 652-653; *Oklahoma Press Publ. Co.* v. *Walling, supra,* 327 U.S. at 208. Since the power to conduct an investigation to determine whether the law has been violated includes the power to determine coverage, the court was correct in enforcing the entire subpoenas. *Oklahoma Press Publ. Co.* v. *Walling, supra,* 327 U.S.

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[4] Section 19(b) of the Securities Act, 15 U.S.C. 77s(b); Section 21(b) of the Securities Exchange Act, 15 U.S.C. 78u(b).

[5] The district court's function is not abused or abased, as petitioners imply (Pet. 12-13), in so limiting the district court's inquiry in enforcement of administrative subpoenas. *Oklahoma Press Publ. Co.* v. *Walling,* 327 U.S. 186, 217 n. 57.

at 210 n. 47; *Endicott Johnson Corp.* v. *Perkins, supra.*

See v. *City of Seattle,* 387 U.S. 541, relied upon by petitioners, is not relevant. *See* held that warrants were required for physical entry for inspection of private commercial premises. By contrast, agency subpoenas, as this Court has said (*Oklahoma Press Publ. Co.* v. *Walling, supra,* 327 U.S. at 195);

> present no question of actual search and seizure * * *. No officer or other person has sought to enter petitioners' premises against their will, to search them, or to seize or examine their books, records or papers without their assent, otherwise than pursuant to orders of the court authorized by law and made after adequate opportunity to present objections * * *.

Such subpoenas are markedly different from the forced entries onto commercial property involved in *See.* The argument of petitioners would similarly require a showing of probable cause for a grand jury subpoena, which is wholly at odds with this Court's recent decisions. See *United States* v. *Dionisio,* 410 U.S. 1, and *United States* v. *Mara,* 410 U.S. 19.[6]

2. Petitioners also argue (Pet, 16-18) that the term "investment contract" in Section 2(1) of the Securities Act, 15 U.S.C. 77b(1), is void for vagueness under the due process clause of the Fifth Amendment.

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[6]Petitioners have also urged that the court of appeals erred in ruling that the district court's imposition of a cautionary statement on the investigation was an abuse of its discretion. The statement however, was in many respects "inaccurate and incomplete" (Pet. App. 20a). In any event, petitioners made no showing of any need for this protection. *Cf. Federal Communications Commission* v. *Schreiber,* 381 U.S. 279, 295-299.

a. The contention is premature. "Void for vagueness simply means that criminal responsibility should not attach where one could not reasonably understand that his contemplated conduct is proscribed" (*United States* v. *National Dairy Corp.*, 372 U.S. 29, 32-33). Whether petitioners had notice that their conduct was unlawful—or even whether their conduct was in fact unlawful—are questions which cannot appropriately be determined in a subpoena enforcement proceeding. Until the Commission determines what the petitioners in fact have done, it is pointless to speculate about whether they did know, or should have known, that their conduct was unlawful.

b. In any event the term is not vague. The term "investment contract" has been construed by this Court on five separate occasions.[7] This Court has stated that its meaning "had been crystallized by * * * prior judicial interpretation" in the state courts before Congress included it in Section 2(1) of the Securities Act. *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293, 298.[8]

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[7] *Tcherepnin* v. *Knight*, 389 U.S. 332, 338; *Securities and Exchange Commission* v. *United Benefit Life Ins. Co.*, 387 U.S. 202, 211; *Securities and Exchange Commission* v. *Variable Annuity Life Ins. Co.*, 359 U.S. 65, 72; *Securities and Exchange Commission* v. *W. J. Howey Co.*, 328 U.S. 293; *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344.

[8] *Connally* v. *General Construction Co.*, 269 U.S. 385, and *Lanzetta* v. *New Jersey*, 306 U.S. 451, cited by petitioners (Pet. 17) are not inconsistent with the decision of the court below. In *Connally*, the Court held a statute unconstitutional because the application of the statute did not depend upon a word of fixed meaning in itself or one made definite by statutory or judicial definition or by the context or other legitimate aid to its construction. In *Lanzetta* v. *New*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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Jersey, the Court held unconstitutional a statute which in effect made it unlawful for a person not to be engaged in "any lawful occupation" if he were a member of a "gang consisting of two or more persons" and been previously convicted of certain offenses. The word "gang" was found to have no common law antecedent and no available definition relating to criminal activities.

Petitioners also argue that the term has been construed even by this Court as if it provided for civil remedies only and that the term should be subject to the stricture that criminal statutes should be construed narrowly (Pet. 18). However, the Court has rejected the argument that the term "investment contract" should be construed with strictness because violations of the Securities Act are crimes. *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 353-355.

Petitioners have also argued that Congress intended to remove sales of non-negotiable documents of title to specific, identified casks of Scotch whisky from the definition of security in Section 2(1) of the Securities Act (Pet. 15). There is no evidence of such intent in the legislative history. See H. Rep. No. 1838, 73d Cong., 2d Sess. (1934) p. 39. Moreover, the broader term "investment contract" cannot be read out of the section. Cf. *Securities and Exchange Commission* v. *C. M. Joiner Leasing Corp.*, 320 U.S. 344, 351-352.